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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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AMERICAN BANKERS ASSOCIATION,
a national trade association,
et al.,

Plaintiffs,

v.

BILL LOCKYER, Attorney General
of the State of California, et
al.,

Defendants.

NO. CIV. S-02-1138 FCD JFM

MEMORANDUM AND ORDER

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This action is before the court on plaintiffs American Bankers Association, America's Community Bankers, Chase Manhattan Bank USA, N.A., Citibank (South Dakota), N.A., Consumer Bankers Association, Credit Union National Association, Inc., First USA Bank, N.A., Household Bank (SB), N.A., Independent Community Bankers of America, MBNA America Bank, N.A., and National Association of Federal Credit Unions' (collectively, "plaintiffs") (1) motion for a preliminary injunction, and (2)

1 motion for summary judgment and permanent injunctive relief.
2 Briefing has been submitted by the parties as well as *amicus*
3 *curiae* Office of the Comptroller of the Currency ("OCC") in
4 support of the motions, and *amicus curiae* Consumers Union,
5 Consumer Action, California Public Interest Research Group
6 (CalPIRG), Consumer Federation of America, National Consumer Law
7 Center, United States Public Interest Research Group, and AARP
8 ("Consumers Union") in opposition to the motions. Plaintiffs seek
9 a preliminary injunction restraining defendants Bill Lockyer,
10 Attorney General of the State of California, and Kathleen
11 Hamilton, Director of the California Department of Consumer
12 Affairs ("defendants" or the "State") from enforcing California
13 Civil Code section 1748.13 (the "statute" or "section 1748.13").
14 Plaintiffs further seek summary judgment and a permanent
15 injunction against defendants' enforcement of the statute on the
16 basis that section 1748.13 is preempted by federal banking laws
17 and thus inapplicable to all federally chartered credit card
18 issuers. The court heard oral argument on December 6, 2002, and
19 by this order now renders its decision.

20 **FACTUAL BACKGROUND**

21 **1. California Civil Code Section 1748.13**

22 In 2001, the California legislature passed Assembly Bill
23 Number 865. See Resp. of Defs. Bill Lockyer and Kathleen Hamilton
24 to Pltfs.' Statement of Undisputed Facts ("UF"), filed Oct. 25,
25 2002, UF 1. The Bill was codified as California Civil Code
26 section 1748.13. Id. The Attorney General and Department of
27 Consumer Affairs have the power and duty to enforce section
28 1748.13. UF 2.

1 Section 1748.13 requires that certain language and
2 information be placed on the billing statements credit card
3 issuers provide their cardholders. The statute applies to all
4 credit cards,¹ but differentiates "retail credit cards" as a
5 separate category with slightly different requirements.² See Cal.
6 Civ. Code §§ 1748.13(a)(1)(A)(ii), 1748.13(b)(3).

7 According to defendants, the statute was designed to provide
8 credit card users with warnings about the length of time and
9 total amount of cost a cardholder will incur if (s)he repays the
10 outstanding balance on a credit card by remitting only the
11 minimum payment on each periodic bill. Section 1748.13 requires
12 credit card issuers to include the warnings contemplated by the
13 statute except in billing cycles where they either: (1) require a
14 minimum payment of at least 10% of the cardholder's outstanding
15 balance; or (2) do not impose finance charges. Cal. Civ. Code §
16 1748.13(c)(1)-(2); UF 4.

17 When credit card issuers do not meet these exceptions, they
18 must provide the warnings and information to cardholders
19 contemplated by the statute. First, each cardholder's bill must
20 display two messages on the front of the first page, in
21 capitalized type that is at least 8-point size. Cal. Civ. Code §
22 1748.13(a); UF 3. The first message is required and must state,

23 ¹ Credit cards are defined under section 1748.12 as
24 "[a]ny card, plate, coupon book, or other single credit device
25 existing for the purpose of being used from time to time upon
26 presentation to obtain money, property, labor or services on
credit."

27 ² Retail credit cards are those that are "[i]ssued by or
28 on behalf of a retailer, or a private label credit card that is
limited to customers of a specific retailer." Cal. Civ. Code §
1748.13(b)(3).

1 "Minimum Payment Warning: Making only the minimum payment will
2 increase the interest you pay and the time it takes to repay your
3 balance." Cal. Civ. Code § 1748.13(a)(1); UF 3. The statute also
4 requires a second message, but allows the credit card issuer to
5 decide between two optional methods of presenting further
6 warnings and distributing information required by the statute.
7 The credit card issuer must decide to provide one of the
8 following options.

9 The first option is set out in section 1748.13(a)(2)(A). It
10 provides that immediately after the Minimum Payment Warning, the
11 credit card issuer must provide a short statement that describes
12 the time it would take and the total cost to a cardholder if
13 (s)he paid off balances of \$1000, \$2500, and \$5000 by paying only
14 the minimum payment, if the billing was based on an annual
15 percentage rate of 17% and a minimum payment of 2% of the bill or
16 \$10 (whichever was greater). UF 3. Credit card issuers can
17 satisfy the requirements of this option if they provide the same
18 information for the three specified balance amounts at the annual
19 percentage rate and required minimum payment which are applicable
20 to an individual cardholder's account. Cal. Civ. Code §
21 1748.13(a)(2)(A)(i); UF 3.³ If the credit card issuer chooses to
22 provide this message then, immediately following the required
23 wording, it must provide the following written statement: "For an
24 estimate of the time it would take to repay your balance, making
25 only minimum payments, and the total amount of those payments,
26 call this toll-free number: (Insert toll-free telephone number)."

27 ³ Similar requirements are imposed on retail credit card
28 issuers. See Cal. Civ. Code § 1748.13(a)(2)(A)(ii).

1 Cal. Civ. Code § 1748.13(a)(3)(A); UF 3. The statute requires
2 that the toll-free number be available between the hours of 8
3 a.m. and 9 p.m. Pacific Standard Time, seven days a week. The
4 statute also mandates that the toll-free number provide consumers
5 with the opportunity to speak to a person, rather than a
6 recording, from whom the individualized account information
7 discussed above can be obtained. Cal. Civ. Code §
8 1748.13(a)(3)(B); UF 3.

9 The second option, under section 1748.13(a)(2)(B), allows a
10 creditor to print a written statement on the front of the bill's
11 first page that provides individual, "customized" information to
12 the cardholder. UF 3. This information would indicate an estimate
13 of the number of years and months and the approximate total cost
14 to pay off the entire balance due on an account if, based on the
15 terms of the credit agreement, the cardholder were to pay only
16 the minimum amount due for each bill. If the credit card issuer
17 chooses this option, the bill must also provide the cardholder
18 with either a referral to a credit counseling service or the
19 "800" number for the National Foundation for Credit Counseling
20 (through which the cardholder can be referred to credit
21 counseling services in, or closest to, the cardholder's county of
22 residence).⁴ A credit card issuer is *required* to use this option
23 if the cardholder has not paid more than the minimum payment for
24 6 consecutive months after July 1, 2002. Cal. Civ. Code
25 § 1748.13(a)(2)(B); UF 3; UF 8.

26
27 ⁴ If the credit card issuer employs this option and the
28 account is based on a variable rate, the credit card company may
make disclosures based on the rate for the entire balance as of
the date of the disclosure and indicate that the rate may vary.

1 In addition to the requirements described above, the statute
2 mandates that the Department of Financial Institutions ("DFI")
3 establish a detailed table illustrating the approximate number of
4 months and approximate total cost to repay an outstanding balance
5 if the consumer pays only the required minimum monthly payments
6 and if no other fees are incurred. Cal. Civ. Code §
7 1748.13(a)(3)(C). These tables must consider: a significant
8 number of interest rates (§ 1748.13(a)(3)(C)(i)); a significant
9 number of different account balances (with the difference between
10 amounts considered no greater than \$100) (§
11 1748.13(a)(3)(C)(ii)); a significant number of different payment
12 amounts (§ 1748.13(a)(3)(C)(iii)); and that only minimum monthly
13 payments are made with no additional charges or fees incurred on
14 the account. Cal. Civ. Code § 1748(a)(3)(C)(iv).

15 The information developed by the DFI can be referenced when
16 a cardholder calls the toll-free line and requests information on
17 how long and at what cost they would pay off a balance using a
18 minimum payment, or when the credit card issuer is required to
19 disclose this information to cardholders who have paid only the
20 minimum for 6 consecutive months. However, credit card issuers
21 are not allowed to include the full chart with a billing
22 statement to satisfy their obligations under the statute. Cal.
23 Civ. Code § 1748.13(a)(3)(D); UF 7.

24 **2. Consumer Debt**

25 Defendants maintain that the statute should withstand
26 constitutional challenge because it benefits Californians by
27 requiring credit card issuers to provide information regarding
28 the costs and consequences of remitting only minimum monthly

1 credit card payments. Defs.' Mem. of P. & A. in Opp'n to Pltfs.'
2 Appl. for a Prelim. Inj. and Mot. for Summ. J. ("Defs.' Opp'n to
3 MSJ"), filed Oct. 25, 2002, at 2. Defendants represent that "U.S.
4 and California households are facing an unprecedented debt
5 crisis, brought about in large part by high levels of revolving
6 credit card debt." Id. at 3.

7 A marked increase in purchases made with credit cards in the
8 1990s is in part responsible for the now-record levels of
9 indebtedness across the United States. Id. Between 1990 and 2001,
10 the total amount of revolving debt in United States households
11 increased by 193%, from \$190.9 to \$559.6 billion. Id. at 3;
12 Defs.' App. of Non-Federal Authorities and Other Cited Sources in
13 Supp. of Defs.' Opp'n to Pltfs.' Appl. For Prelim. Inj. and Mot.
14 for Summ. J. ("Defs.' App."), filed Oct. 25, 2002, at Exs. 24,
15 33. Defendants represent that in 2001, at least 55% of United
16 States households (or approximately 41.7 million households
17 total) holding a credit card revolved balances from month to
18 month.⁵ Californians accounted for approximately 4.5 million of
19 these households, for a total sum of \$61 billion in revolving
20 debt owed by California's credit cardholders alone. Defs.' Opp'n
21 to MSJ at 3-4.

22 The problem was further compounded in the 1990s when the
23 growth of consumer debt exceeded the growth of personal
24 disposable income. Id. at 4. For example, defendants represent

25 ⁵ Defendants' citation for this statistic appears to be
26 in error. In footnote 6 of their opposition brief, defendants
27 cite to their appendix of authorities at Ex. 32, page 625.
28 However, that exhibit only reflects statistics through the year
2000, and the particular table on page 625 only reflects
statistics through 1998.

1 that between 1989 and 1998, the median annual income increased
2 34%, while the median debt increased 148% and credit card debt
3 increased 111%. See Defs.' App. at Exs. 38, 48, 49. In addition,
4 for the first time in history, total household debt surpassed
5 total household income in the United States in 2001. Defs.' Opp'n
6 to MSJ at 4.

7 Defendants maintain that low and middle-income households,
8 as well as college students, are "bearing the brunt" of this debt
9 crisis. Id. at 5. In support of their position, defendants point
10 to data indicating that low and middle-income households hold
11 higher credit card debt-to-income ratios than others. Id. at 5-6.
12 In addition, college students are increasingly graduating with
13 large amounts of credit card debt. Manning Decl., filed Oct. 29,
14 2002, at ¶ 29. Defendants posit that lower-income and college-
15 aged individuals are less likely to understand the consequences
16 of making only minimum monthly payments on their credit cards
17 while continuing to accrue additional charges. Id. at ¶¶ 34, 38,
18 39. Further, defendants note the major incentive of credit card
19 issuers to target low and middle-income households, due to the
20 fact that the issuers make the majority of their profits from
21 these populations. Id. at ¶ 9.

22 Finally, defendants cite a number of practical consequences
23 resulting from the debt crisis, including the following: a rising
24 number of delinquent accounts and personal bankruptcies;
25 resulting financial instability and increasing family pressures,
26 including health problems and divorce; bad credit resulting in
27 inability to finance purchases of homes and cars; and adverse
28 effects on the health of children, communities, and attendance at

1 work. See Defs.' Opp'n to MSJ at 8-10 and accompanying citations.
2 Thus, the State asserts that enactment of section 1748.13 will
3 benefit Californians by requiring credit card issuers to inform
4 consumers about the consequences of making minimum monthly credit
5 card payments. Id. at 10.

6 **3. The Statute's Burdens**

7 Unsurprisingly, the parties disagree over the extent of
8 burdens imposed by the statute. Plaintiffs maintain that the
9 costs of compliance with the statute will amount to millions of
10 dollars in the aggregate in the first six months following
11 implementation alone.⁶ Staten Decl. No. 4, filed Sept. 20, 2002,
12 at ¶ 5. Plaintiffs break down the cost estimates of compliance as
13 follows:

14 (A) Total "startup" costs already incurred: \$3,352,797;

15 (B) Estimated one-time future startup costs:
16 \$15,063,069;

17 (C) Average monthly total of estimated ongoing costs
18 for the six months following implementation of the
19 statute: \$2,395,328.50; and

20 (D) Average monthly total of estimated ongoing costs
21 after the first six months following implementation of
22 the statute: \$1,904,732, including \$684,642.50 for
23 operation of the phone bank.

24
25 ⁶ Prof. Staten bases his figures on data provided to him
26 for the following six large credit card issuers: Chase Manhattan
27 Bank USA, N.A.; Citibank (South Dakota), N.A.; First USA Bank,
28 N.A.; Household Bank (SB), N.A.; MBNA America Bank, N.A.; and
Fleet Bank (R.I.), N.A. Staten Decl. No. 4 at ¶ 3. Prof. Staten
did not review the figures provided to him prior to conducting
his computations. Id.

1 Staten Decl. No. 4 at ¶ 5. The types of monetary costs defendants
2 will accrue in complying with the statute's requirements include,
3 for example, paper, postage, and printing costs, hardware and
4 software development and maintenance costs, and costs associated
5 with staffing and operation of the phone banks. See Mem. of P. &
6 A. in Supp. of Pltfs.' Mot. for Summ. J. and Permanent Inj.
7 Relief ("Pltfs.' MSJ"), filed Sept. 20, 2002, at 15-19.

8 Plaintiffs further maintain that the statute imposes
9 significant non-monetary burdens on national banks. For example,
10 some smaller federal institutions have stated their intention to
11 exit the California credit card market entirely should the
12 statute be implemented. See Hamby Decl., filed Sept. 20, 2002, at
13 ¶ 7; Youngs Decl., filed Sept. 20, 2002, at ¶¶ 7-8. In addition,
14 plaintiffs have introduced some evidence that the required
15 Minimum Payment Warning is misleading to consumers. See Ward
16 Decl., filed Sept. 20, 2002, at ¶ 9-11. Finally, plaintiffs
17 submit that section 1748.13's requirements regarding counseling
18 procedures interfere with national banks' business experience
19 with the propriety and timing of such counseling measures. See
20 Hill Decl., filed Sept. 20, 2002, at ¶ 9; Kietz Decl. No. 1,
21 filed May 31, 2002, at ¶ 20; Weber Decl. No. 1, filed May 31,
22 2002, at ¶ 19.

23 In contrast, defendants maintain that costs associated with
24 implementation of and compliance with the statute are not
25 burdensome. For example, defendants assert that plaintiffs
26 already have special operating procedures in place that would
27 enable them to vary the format of monthly statements to provide
28 certain information only to particular customers. See Decl.,

1 filed under seal pursuant to protective order Oct. 25, 2002, at
2 Exs. 6, 8. Similarly, defendants allege that programs already
3 exist which would allow plaintiffs to track payment patterns of
4 customers without significant expense. Id. at Exs. 13-16.
5 Further, defendants assert that plaintiffs already operate
6 staffed phone banks similar to those required by the statute. Id.
7 at Exs. 17, 19, 21, 22, 24. In addition, defendants assert that
8 training expenses and start-up costs will not be significant. Id.
9 at Ex. 4. Finally, defendants maintain that ongoing costs of
10 compliance will amount to a very small percentage of plaintiffs'
11 gross profits.

12 **PROCEDURAL BACKGROUND**

13 Plaintiffs filed this action on May 24, 2002, seeking to
14 enjoin the commencement and enforcement of section 1748.13 on the
15 following grounds: (1) under the Supremacy Clause, the statute is
16 preempted by the National Bank Act of 1864 ("NBA"), 12 U.S.C. §§
17 21 *et seq.*, and the Federal Credit Union Act ("FCUA"), 12 U.S.C.
18 §§ 1751 *et seq.*; (2) the statute violates the dormant commerce
19 clause; and (3) the statute violates 42 U.S.C. § 1983 because it
20 violates either the NBA, the FCUA or the Constitution. Compl.,
21 filed May 24, 2002, ¶¶ 3, 10.

22 Plaintiffs first sought a preliminary injunction against
23 enforcement of section 1748.13 by their motion filed May 31,
24 2002. Mem. of P. & A. in Supp. of Pltfs.' Appl. for Prelim. Inj.
25 ("Pltfs.' Appl. for PI"), filed May 31, 2002. The court heard
26 oral argument on June 28, 2002 and issued an order finding the
27 record at that time insufficient to render a decision as to the
28 issuance of a preliminary injunction. Mem. & Order, filed June

1 28, 2002, at 11. Accordingly, the court continued the hearing on
2 the motion and permitted the parties to conduct limited discovery
3 until August 30, 2002, and to thereafter file supplemental
4 briefs. The parties were further directed to answer certain
5 questions in their supplemental briefs on matters of interest to
6 the court. See Order, filed July 5, 2002. Enactment of the
7 statute was enjoined pending the continued hearing on the motion.
8 Mem. & Order, filed June 28, 2002, at 2.

9 Plaintiffs filed their supplemental brief along with their
10 motion for summary judgment on September 20, 2002. Defendants
11 opposed both motions in one brief filed October 25, 2002, and
12 plaintiffs filed a reply brief on November 15, 2002. Plaintiffs
13 base their motion for summary judgment on the grounds that
14 section 1748.13 is wholly preempted by the NBA, the FCUA, the
15 Home Owners' Loan Act ("HOLA"),⁷ and the Supremacy Clause.
16 Plaintiffs maintain that there is no genuine issue of material
17 fact regarding the preemption analysis, and that therefore they
18 are entitled to judgment as a matter of law, as well as a
19 permanent injunction barring enforcement of the statute against
20 all federally chartered credit card issuers.

21 **STANDARD⁸**

22 The Federal Rules of Civil Procedure provide for summary
23

24 ⁷ While defendants do not dispute the appropriateness of
25 plaintiffs' HOLA preemption argument in their motion for summary
26 judgment, the court notes that plaintiffs' complaint does not
include a claim for relief based on preemption by HOLA. See
Compl., filed May 24, 2002, ¶¶ 3, 10.

27 ⁸ Because the court's decision on plaintiffs' motion for
28 summary judgment moots plaintiffs' motion for a preliminary
injunction, the court does not recite the applicable standard
herein.

1 adjudication when "the pleadings, depositions, answers to
2 interrogatories, and admissions on file, together with
3 affidavits, if any, show that there is no genuine issue as to any
4 material fact and that the moving party is entitled to a judgment
5 as a matter of law." Fed. R. Civ. P. 56(c). One of the principal
6 purposes of the rule is to dispose of factually unsupported
7 claims or defenses. Celotex Corp. v. Catrett, 477 U.S. 317, 325
8 (1986).

9 In considering a motion for summary judgment, the court must
10 examine all the evidence in the light most favorable to the
11 non-moving party. United States v. Diebold, Inc., 369 U.S. 654,
12 655 (1962). If the moving party does not bear the burden of proof
13 at trial, he or she may discharge his burden of showing that no
14 genuine issue of material fact remains by demonstrating that
15 "there is an absence of evidence to support the non-moving
16 party's case." Celotex, 477 U.S. at 325. Once the moving party
17 meets the requirements of Rule 56 by showing there is an absence
18 of evidence to support the non-moving party's case, the burden
19 shifts to the party resisting the motion, who "must set forth
20 specific facts showing that there is a genuine issue for trial."
21 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986).

22 Genuine factual issues must exist that "can be resolved only by a
23 finder of fact, because they may reasonably be resolved in favor
24 of either party." Id. at 250.

25 In judging evidence at the summary judgment stage, the court
26 does not make credibility determinations or weigh conflicting
27 evidence. See T.W. Elec. v. Pacific Elec. Contractors Ass'n, 809
28 F.2d 626, 630-31 (9th Cir. 1987) (citing Matsushita Elec. Indus.

1 Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)). The
 2 evidence presented by the parties must be admissible. Fed. R.
 3 Civ. P. 56(e). Conclusory, speculative testimony in affidavits
 4 and moving papers is insufficient to raise genuine issues of fact
 5 and defeat summary judgment. See Falls Riverway Realty, Inc. v.
 6 City of Niagara Falls, 754 F.2d 49, 57 (2d Cir. 1985); Thornhill
 7 Publ'g Co., Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979).

8 ANALYSIS

9 1. General Preemption Principles

10 Federal preemption of state law may occur expressly, by
 11 implication, or by actual conflict with federal law. Express
 12 preemption occurs when Congress states in explicit terms its
 13 intent to preempt state law. Jones v. Rath Packing Co., 430 U.S.
 14 519, 525 (1977). Preemption by implication, or "field
 15 preemption," occurs when federal regulation in a particular area
 16 is "so pervasive as to make reasonable the inference that
 17 Congress left no room for the States to supplement it." Rice v.
 18 Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Finally,
 19 conflict preemption⁹ exists when there is an actual conflict
 20 between state and federal law. See Fidelity Federal Savings &
 21 Loan Assoc. v. de la Cuesta, 458 U.S. 141, 153 (1982).

22 The Supreme Court has described the applicable inquiry in
 23 assessing whether a conflict exists between state and federal law
 24 in a numbers of manners. See Barnett Bank of Marion County v.
 25 Nelson, 517 U.S. 25, 31 (1996). For example, actual conflict
 26 arises when simultaneous compliance with state and federal law is

27
 28 ⁹ Conflict preemption is sometimes treated as a type of
 implied preemption. See Geier, 529 U.S. at 884.

1 a "physical impossibility," or when state law "'stands as an
2 obstacle to the accomplishment and execution of the full purposes
3 and objectives of Congress.'" Bank of America v. City & County of
4 San Francisco, 309 F.3d 551, 558 (9th Cir. 2002) (quoting Florida
5 Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43
6 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941)). In
7 addition, in some instances, federal and state law can be in
8 "irreconcilable conflict." Rice v. Norman Williams Co., 458 U.S.
9 654, 659 (1982). Further, a state law is preempted when it
10 "frustrates the purpose of [] national legislation, or impairs
11 the efficiencies of [] agencies of the federal government to
12 discharge the[ir] duties." McClellan v. Chipman, 164 U.S. 347,
13 357 (1896). Alternatively, "[s]tate regulation of banking is
14 permissible when it 'does not prevent or significantly interfere
15 with the national bank's exercise of its powers.'" Bank of
16 America, 309 F.3d at 558-59 (quoting Barnett Bank, 517 U.S. at
17 33).

18 States are not without any authority to impose regulations
19 upon national banks. They do "retain some power to regulate
20 national banks in areas such as contracts, debt collection,
21 acquisition and transfer of property, and taxation, zoning,
22 criminal, and tort law." Bank of America, 309 F.3d at 559 (citing
23 cases). However, because there is a "'history of significant
24 federal presence' in national banking, the presumption against
25 preemption of state law is inapplicable." Id. (citing United
26 States v. Locke, 529 U.S. 89, 108 (2000)).

27 **2. Truth in Lending Act**

28 Defendants argue that it was Congress's intent that the

1 federal Truth in Lending Act ("TILA"), rather than the NBA, HOLA,
2 or FCUA determine whether states' credit card disclosure laws are
3 preempted by federal law. See Notice of Errata and Mem. of P. &
4 A. in Opp'n to Pltfs.' Appl. for Prelim. Inj. ("Defs.' Opp'n to
5 PI"), filed June 19, 2002, at 11-12; Defs.' Opp'n to MSJ at 14.
6 TILA was enacted to "protect the consumer against inaccurate and
7 unfair credit billing and credit card practices," and to provide
8 for the "meaningful disclosure of credit terms." 15 U.S.C. §
9 1601(a). TILA grants the Board of Governors of the Federal
10 Reserve System power to prescribe regulations and carry out the
11 purposes of the Act. See 15 U.S.C. § 1604(a).

12 Defendants point out that TILA does not preempt state laws
13 regarding credit transaction disclosures "except to the extent
14 that those laws are inconsistent with the provisions of this
15 subchapter and then only to the extent of the inconsistency." 15
16 U.S.C. § 1610(a)(1). Defendants maintain that "[b]ecause TILA
17 governs credit card disclosures in detail and applies to banks as
18 creditors, Congress intended it to occupy the entire field of
19 consumer disclosures." Defs.' Opp'n to PI at 13.

20 Defendants identify TILA's "savings clause" as evidence that
21 state laws governing disclosures are not preempted unless they
22 conflict with federal law. TILA's savings clause provides:

23 Except as provided in subsection (e) of this section,¹⁰
24 this part and parts B and C of *this subchapter* do not
25 annul, alter, or affect the laws of any State relating
26 to the disclosure of information in connection with
credit transactions, except to the extent that those
laws are inconsistent *with the provisions of this*

27 ¹⁰ Subsection (e) refers to credit and charge card
28 application and solicitation disclosure provisions, and has no
bearing on the analysis here.

1 *subchapter* and then only to the extent of the
2 inconsistency.

3 15 U.S.C. § 1610(a)(1) (emphasis added). Thus, the express
4 language of the savings clause indicates that its anti-preemptive
5 effect is limited to TILA. The text provides no indication that
6 the savings clause reaches beyond TILA to control the preemption
7 analysis applicable under any other federal laws, including the
8 federal banking laws.

9 The Ninth Circuit reached a similar conclusion in its recent
10 opinion in Bank of America. In Bank of America, the court
11 addressed the scope of the Electronic Fund Transfer Act's
12 ("EFTA") savings clause, which bears a striking similarity to
13 TILA's. 309 F.3d at 565. The EFTA's savings clause provides in
14 part:

15 *This subchapter* does not annul, alter, or affect the
16 laws of any State relating to electronic fund
17 transfers, except to the extent that those laws are
18 inconsistent with the provisions of *this subchapter*,
19 and then only to the extent of the inconsistency.

20 15 U.S.C. § 1693q (emphasis added). The Ninth Circuit stated that
21 "the plain language of § 1693q indicates that it is limited to
22 the EFTA. Section 1693q's reference to 'this subchapter'
23 indicates that the EFTA's anti-preemption provision does not
24 apply to other statutes." 309 F.3d at 565. The court further
25 concluded that "[b]ecause the EFTA's anti-preemption provision is
26 limited to the EFTA, it does not save the Ordinances against
27 preemption by the HOLA and the National Bank Act." Id.

28 In light of the Ninth Circuit's findings in Bank of America
regarding a substantially similar savings clause under the EFTA,
the court finds that TILA's savings clause does not save section

1 1748.13 from preemption by other federal banking laws such as the
2 HOLA, NBA, and FCUA.

3 **3. Home Owners' Loan Act**

4 The Home Owners' Loan Act of 1933 ("HOLA") "was enacted to
5 restore the public's confidence in savings and loan associations
6 at a time when 40% of home loans were in default." Bank of
7 America, 309 F.3d at 559. The enactment of HOLA was due in part
8 to Congress's dissatisfaction with the manner in which states
9 were conducting the regulation of home financing. See Conference
10 of Fed. Sav. & Loan Ass'ns v. Stein, 604 F.2d 1256, 1257 (9th
11 Cir. 1979), aff'd, 445 U.S. 921 (1980).

12 The Office of Thrift Supervision ("OTS") is charged with
13 responsibility for the administration and enforcement of HOLA. 12
14 C.F.R. § 500.1(a). Pursuant to HOLA, the OTS has the power,
15 "under such regulations as [it] may prescribe - [] to provide for
16 the organization, incorporation, examination, operation, and
17 regulation of . . . Federal savings associations" 12
18 U.S.C. § 1464(a). The OTS has broad discretion to promulgate
19 regulations that are "appropriate to carry out [its]
20 responsibilities." 12 U.S.C. § 1463(a)(2).

21 The Supreme Court has stated that "[f]ederal regulations
22 have no less pre-emptive effect than federal statutes." See De la
23 Cuesta, 458 U.S. at 153. In addition, the Court has specifically
24 noted that OTS regulations govern the "'powers and operations of
25 every federal savings and loan association from its cradle to its
26 corporate grave.'" Id. at 145 (quoting People v. Coast Fed. Sav.
27 & Loan Ass'n, 98 F. Supp. 311, 316 (S.D. Cal. 1951)). The Ninth
28 Circuit has further recognized that OTS regulation of federal

1 savings associations is "so pervasive as to leave no room for
2 state regulatory control." Stein, 604 F.2d at 1260; Bank of
3 America, 309 F.3d at 558.

4 The OTS regulations themselves expressly declare they are
5 "preemptive of any state law purporting to address the subject of
6 the operations of a Federal savings association." 12 C.F.R. §
7 545.2. The regulations further specify that the OTS governs the
8 lending-related practices of federal savings associations:

9 OTS hereby occupies the entire field of lending
10 regulation for federal savings associations. OTS
11 intends to give federal savings associations maximum
12 flexibility to exercise their lending powers in
13 accordance with a uniform federal scheme of regulation.
Accordingly, federal savings associations may extend
14 credit as authorized under federal law, including this
part, without regard to state laws purporting to
regulate or otherwise affect their credit activities.

12 C.F.R. § 560.2(a).

15 Importantly, the regulations provide a list of "illustrative
16 examples" which set out "the types of state laws preempted by
17 paragraph (a) of this section." 12 C.F.R. § 560.2(b). Included in
18 the list of preempted state laws are those that govern the terms
19 of credit, such as adjustments to interest rates, balances, and
20 payments due. 12 C.F.R. § 560.2(b)(4). Additionally preempted are
21 those state laws that concern "[d]isclosure and advertising,
22 including laws requiring specific statements, information, or
23 other content to be included in . . . billing statements . . . or
24 other credit-related documents" 12 C.F.R. § 560.2(b)(9).

25 In Bank of America, the Ninth Circuit found that a conflict
26 existed where OTS regulations authorized federal savings
27 associations to use "electronic means or facilities to perform
28 any function, or provide any product or service" while certain

1 municipal ordinances prohibited financial institutions from
2 charging ATM fees to non-depositors. 309 F.3d at 556, 560-61. The
3 court noted that OTS regulations occupied the field of
4 operations, deposit, and lending practices of federal savings
5 banks. Id. at 560. The court further held that HOLA and OTS
6 regulations preempted conflicting state limitations on the
7 authority of federal savings associations to collect fees
8 relating to electronic services. Id. at 560-61.

9 Similarly, the OTS regulations at issue here conflict with
10 the requirements of section 1748.13. For example, section
11 1748.13(c)(1) requires that credit card issuers charge at least a
12 10% minimum payment of a cardholder's outstanding balance in
13 order to escape the statute's requirements. Cal. Civ. Code §
14 1748.13(c)(1). Although defendants argue that this provision does
15 not impose a "requirement" but rather provides an "option" for
16 those banking institutions that seek to avoid the requirements of
17 section 1748.13, the statute nevertheless functions to coerce
18 savings and loan associations to adopt the State's rules
19 regarding payment requirements in direct contravention of OTS
20 regulation 560.2(b)(4).

21 Further, section 1748.13's disclosure requirements conflict
22 with OTS regulation 560.2(b)(9). Under section 560.2(b)(9), state
23 laws regarding disclosure, including those requiring specific
24 statements or information in billing statements, are preempted.
25 12 C.F.R. § 560.2(b)(9). As described above, section 1748.13
26 requires that a number of specific disclosure statements be
27 included in a credit cardholder's billing statement. For example,
28 the Minimum Payment Warning clause must be included in all

1 billing statements. Cal. Civ. Code § 1748.13(a)(1). In addition,
2 every statement must also include some type of disclosure
3 identifying the ultimate cost and length of time it would take to
4 pay off a balance by remitting only the minimum payment each
5 billing period. While the card issuer retains some choice over
6 whether, for example, it will opt to include a generic or
7 individualized statement of the time and cost of repayment, it
8 nevertheless must include one of the statements described in the
9 statute. Because section 1748.13's disclosure requirements
10 mandate that specific information be included in cardholders'
11 billing statements, it directly conflicts with OTS regulation
12 560.2(b)(9).

13 Defendants and *amicus curiae* Consumers Union urge that the
14 express declaration of preemptive effect by the federal
15 regulators should be ignored. As such, the OTS declarations of
16 preemptive effect are not "substantive," but rather are self-
17 serving claims of federal authority in the form of "placeholder
18 regulations" which exceed the power of the OTS, and are therefore
19 void. The court concurs that, absent congressional grant, the
20 arrogation of preemptive authority by regulatory fiat is not
21 entitled to judicial deference. Here, however, the courts have
22 recognized the congressional grant of broad power to the OTS in
23 the area of regulatory control of federal savings and loan
24 associations. As stated above, the Supreme Court has recognized
25 that the OTS regulations govern "the powers and operations of
26 every Federal savings and loan association from its cradle to its
27 corporate grave." De la Cuesta, 458 U.S. at 145. The Ninth
28 Circuit has further recognized that OTS regulation of federal

1 savings associations is "so pervasive as to leave no room for
2 state regulatory control." Stein, 604 F.2d at 1260; Bank of
3 America, 309 F.3d at 558. In addition, in Bank of America, the
4 Ninth Circuit found that OTS regulations occupy the field of
5 operations as well as deposit and lending-related practices of
6 federal savings banks:

7 The Ordinances purport to regulate the operations, and
8 the deposit and lending-related practices of federal
9 savings banks. *However, OTS regulations occupy these*
10 *fields. See* 12 C.F.R. § 545.2 (asserting field
11 preemption of operations of federal associations); 12
12 C.F.R. § 557.11(b) (asserting field preemption of
13 deposit-related practices of federal associations); 12
14 C.F.R. § 560.2(a) (asserting field preemption of
15 lending-related practices of federal associations).

16 Bank of America, 309 F.3d at 560 (emphasis added). In light of
17 the Ninth Circuit's holdings regarding section 560.2 as well as
18 other similar OTS regulations, the court finds that such
19 regulations do not exceed the scope of OTS's authority.¹¹

20 Thus, section 1748.13 is in obvious conflict with OTS
21 Regulation 560.2, which provides that state laws governing terms
22 of credit and requiring specific disclosures in billing
23 statements are preempted. Accordingly, the court holds that
24 section 1748.13 in its entirety is preempted by HOLA and its
25 accompanying OTS regulations which occupy the field of lending-

26 ¹¹ It is also noteworthy that a California Court of Appeal
27 has recently found that the OTS did not exceed its authority in
28 promulgating 12 C.F.R. section 560.2. See Wash. Mut. Bank v.
Superior Court, 94 Cal. App. 4th 606, 616-19 (2002) (reciting
history of adoption of section and stating that "[a]t the time
Section 560.2 was issued, OTS advised that this 'general lending
preemption provision,' was simply restating 'long-standing
preemption principles applicable to federal savings associations,
as reflected in earlier regulations, court cases, and numerous
legal opinions issued by OTS and the Federal Home Loan Bank Board
(FHLBB), OTS's predecessor agency.'").

1 related practices of federal savings associations.

2 **4. National Bank Act**

3 The NBA was enacted to establish a national banking system
4 free from intrusive state regulation. See Marquette Nat'l Bank v.
5 First of Omaha Serv. Corp., 439 U.S. 299, 314-15 (1978); See Bank
6 of America, 309 F.3d at 561. Case law reflects that "[t]he
7 supremacy of the federal government in regulating national banks
8 has long been recognized." Bank of America, 309 F.3d at 561
9 (citing cases).

10 The NBA bestows upon national banks the authority:

11 To exercise by its board of directors or duly
12 authorized officers or agents, subject to law, all such
13 incidental powers as shall be necessary to carry on the
14 business of banking; by discounting and negotiating
promissory notes, drafts, bills of exchange, and other
evidences of debt; by receiving deposits . . . by
loaning money on personal security

15 12 U.S.C. § 24 (Seventh). National bank's incidental powers under
16 the NBA "include activities that are 'convenient or useful in
17 connection with the performance of one of the bank's established
18 activities pursuant to its express powers under the National Bank
19 Act.'" Bank of America, 309 F.3d at 562 (citing M & M Leasing
20 Corp. v. Seattle First Nat'l Bank, 563 F.2d 1377, 1382 (9th Cir.
21 1977), cert. denied, 436 U.S. 956 (1978)).

22 In furtherance of the NBA's goal of establishing a national
23 banking system:

24 [T]he Supreme Court has "interpret[ed] grants of both
25 enumerated and incidental 'powers' to national banks as
26 grants of authority not normally limited by, but rather
ordinarily preempting, contrary state law." Barnett
27 Bank, 517 U.S. at 32, 116 S.Ct. 1103 (citations
28 omitted). Therefore, in determining the preemptive
scope of federal statutes and regulations granting a
power to national banks, the Supreme Court has adopted
the view that "normally Congress would not want States

to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." Id. at 33, 116 S.Ct. 1103.

Bank of America, 309 F.3d at 561.

Consistent with general principles of preemption, "[s]tate attempts to control the conduct of national banks are void if they conflict with federal law, frustrate the purposes of the National Bank Act, or impair the efficiency of national banks to discharge their duties." Id. (citing First Nat'l Bank v. California, 262 U.S. 366, 369 (1923)). Alternatively, "[s]tate regulation of banking is permissible when it 'does not prevent or significantly interfere with the national bank's exercise of its powers.'" Bank of America, 309 F.3d at 558-59 (quoting Barnett Bank, 517 U.S. at 33).

A. Office of the Comptroller of the Currency

As is the case with the OTS under the HOLA, the Office of the Comptroller of the Currency ("OCC") is responsible for administration of the NBA. See 12 U.S.C §§ 1, 26-27, 481. The Supreme Court has stated the following general principle regarding agency constructions of regulatory statutes:

It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws.

NationsBank of North Carolina v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-57 (1995) (internal citations and quotation marks omitted).

1 In Bank of America, the Ninth Circuit applied this principle
 2 to the OCC's interpretation of national banks' incidental powers
 3 under the NBA, finding that so long as the OCC's position is
 4 reasonable, it is entitled to "great weight." 309 F.3d at 563.
 5 The Bank of America court was presented with two interpretive
 6 letters issued by the OCC addressing the statute at issue before
 7 the court as well as its *amicus* brief. Id. It found the opinion
 8 letters to be persuasive and consistent with the NBA and OCC
 9 regulations, and thus concluded that they were at least "entitled
 10 to respect." Id. Further, it found that the *amicus* brief was not
 11 unworthy of deference. Id. In making that finding, the court
 12 cited Auer v. Robbins, in which the Supreme Court found that an
 13 *amicus* brief is not unworthy of deference so long as there is "no
 14 reason to suspect that the interpretation does not reflect the
 15 agency's fair and considered judgment on the matter in question."
 16 519 U.S. 452, 462 (1997).

17 Here, as in Bank of America, the OCC proffered two opinion
 18 letters and filed an *amicus* brief.¹²

19 (1) *Amicus* Brief

20 In its *amicus* brief the OCC sets forth in detail the
 21 agency's position that the NBA preempts section 1748.13 in its
 22 entirety. See Mem. *Amicus Curiae* of the Office of the Comptroller
 23 of the Currency in Supp. of National Bank Pltfs.' Appl. for
 24 Prelim. Inj. ("OCC *Amicus* Brief"), filed June 12, 2002; Suppl.
 25 Mem. *Amicus Curiae* of the Office of the Comptroller of the

26 ¹² While the opinion letters do not specifically address
 27 the statute at issue in this case, plaintiffs cite them as
 28 examples of far less onerous state laws than section 1748.13 that
 the OCC concluded were preempted. See Pltfs.' MSJ at 23.

1 Currency in Supp. of National Bank Pltfs.' Mots. for Inj. Relief
2 and Summ. J. ("Suppl. OCC *Amicus* Brief"), filed Sept. 20, 2002.

3 As an introductory matter, the OCC offers the following
4 interpretation of national banks' general powers under the NBA:

5 A necessary aspect of [a national bank's] lending
6 operations is the ability to communicate with customers
7 about repayments and to monitor delinquencies. Bank
8 management is accountable to the OCC, as well as to the
9 marketplace, for ensuring the efficient bank operation
that is fundamental to bank safety and soundness. Thus,
the terms and conditions of extensions of credit, and
the lender's management of credit accounts, are at the
heart of the National Bank Act power to lend money.

10 OCC *Amicus* Brief at 9.

11 As to section 1748.13, the OCC interprets the statute as
12 presenting banks with the option of implementing one of four
13 alternative requirements:

14 (1) Charging no interest on the account balance in
15 order to take advantage of the exemption under section
16 1748.13(c)(2);

17 (2) Requiring a minimum payment of 10% of the account
18 balance in each billing cycle in order to take
19 advantage of the exemption under section 1748.13(c)(1);

20 (3) Providing (i) the basic warning, (ii) three generic
21 examples, and (iii) the phone bank capable of
22 dispensing custom payment estimates;¹³ or

23 (4) Providing (i) the basic warning, (ii) three custom
24 estimates, and (iii) referrals to credit counseling
25 services.

26
27 ¹³ This option would not be available for those
28 cardholders who make only the minimum payment for six consecutive
months. See Cal. Civ. Code § 1748.13(a)(2)(B).

1 See OCC *Amicus* Brief at 13.

2 The OCC concludes that the first option is preempted because
3 12 U.S.C. section 85 governs the interest rates national banks
4 may charge, and permits them to "charge interest with respect to
5 state law or the Federal Reserve discount rate plus 1 percent,
6 whichever is higher." Id. at 14. The OCC finds the second option
7 preempted because it "would encroach directly upon the national
8 bank power to determine the terms and conditions of offers of
9 credit."¹⁴ Id. Further, the third option is preempted because the
10 required disclosures are both significant in length and intrude
11 on the highly valued space on the front page of the statement,
12 and additionally, the phone bank requirements are costly and
13 burdensome.¹⁵ Id. at 15-18. Finally, the fourth option is
14 preempted because the customized estimates impose "significant
15 costs on national bank lending," and "provide consumers with
16 necessarily inaccurate projections." Id. at 18.

17 The court finds the OCC's interpretation of the preemptive
18 effect of the NBA on section 1748.13 to be reasonable. There is
19

20 ¹⁴ The OCC further points to evidence submitted by
21 plaintiffs that one credit card issuer has provided notice to its
22 cardholders that it will require a minimum 10% payment as of the
effective date of section 1748.13. See Dugan Decl., filed May 31,
2002; see also Comstock Decl., filed May 31, 2002, at Ex. A.

23 ¹⁵ The OCC additionally points to a conflict between an
24 OCC regulation and section 1748.13 that is not otherwise
25 addressed by the parties, but merits mentioning here. 12 C.F.R.
26 section 7.3000 provides that "[a] national bank's board of
27 directors should review its banking hours, and independently of
28 any other bank, take appropriate action to establish a schedule
of banking hours." The OCC concludes that because federal law
grants national banks' boards of directors the power to determine
banking hours, states are powerless to override those decisions.
Thus, this section presents a conflict with the phone bank's hour
requirements.

1 no indication in the OCC's *amicus* brief that its opinion as
2 contained therein "does not reflect the agency's fair and
3 considered judgment on the matter in question." Auer v. Robbins,
4 519 U.S. 452, 462 (1997). The brief compares federal law with the
5 requirements of section 1748.13, and comes to reasonable
6 conclusions on questions of preemption. Thus, under Bank of
7 America, the OCC's reasonable position regarding preemption
8 issues in its *amicus* brief is entitled to "great weight" in the
9 NBA analysis.

10 (2) Opinion Letter

11 The OCC cites an opinion letter which addressed a West
12 Virginia law governing the sale of insurance (the "West Virginia
13 opinion letter"). Preemption Opinion, 66 Fed. Reg. 51,502 (Oct.
14 9, 2001).¹⁶ The OCC found that some of the law's requirements
15 were preempted by the Gramm-Leach-Bliley Act ("GLBA").¹⁷ For
16 example, the OCC found that certain disclosures which were
17 subject to "manner and timing" requirements were preempted
18 because they would "increase a bank's operating costs and
19

20 ¹⁶ A second opinion letter cited by plaintiffs addresses
21 an Ohio law requiring that banks resell leased vehicles only
22 through licensed used car dealers. Preemption Opinion, 66 Fed.
23 Reg. 23,977 (May 10, 2001). The OCC found that the law was
24 preempted in part because it "frustrate[d] [national banks']
25 ability to operate their leasing businesses in an economically
26 efficient manner." Id. at 23,979. This opinion letter is only
27 minimally helpful to the court insofar as it establishes the
28 OCC's view that national banks have the power to operate
according to their own opinions on economic efficiencies.

26 ¹⁷ The GLBA contains a preemption provision imposing the
27 standard generally applicable to any federal preemption analysis:
28 state laws which prevent or significantly interfere with a bank's
ability to engage in any activity in which the bank is permitted
to engage under federal law (in the West Virginia case, the GLBA)
are preempted. See Barnett Bank, 517 U.S. at 33.

1 substantively hamper the bank's marketing activities." Id. at
2 51,507-08. It also found that requiring oral disclosures "places
3 additional burdens on banks to train personnel and to develop
4 procedures to ensure compliance with this requirement." Id. at
5 51,508. Further, it found the costs of compliance to be
6 "especially troublesome for small banks," which "need to keep
7 costs down to offer a full array of products and services in the
8 communities they serve." Id.

9 However, the OCC also found that certain provisions of the
10 law were not preempted. For example, the OCC addressed one
11 section that required transactions involving the extension of
12 credit and insurance sales to be completed independently and
13 through separate documents when insurance is required as a
14 condition of the loan. Id. at 51,507. The OCC concluded that this
15 requirement, which imposed "an additional paperwork burden and
16 associated administrative costs on banks," "would not appear to
17 substantially affect the underlying insurance activities." Id.

18 The OCC's reasoning in the West Virginia opinion letter is
19 applicable to a number of the requirements set out in section
20 1748.13. For example, section 1748.13's disclosure requirements
21 will take up numerous lines of space on cardholders' billing
22 statements, which may result in additional paper and postage
23 costs. More importantly, costs associated with operation of the
24 phone banks required under the statute are estimated to be
25 approximately \$684,642.50 per month. Staten Decl. No. 4 at ¶ 5.
26 Undoubtedly, this constitutes a significant burden that would
27 require additional costs in the form of training personnel,
28 staffing the phone banks, and developing compliance procedures.

1 Finally, plaintiffs have submitted the declarations of numerous
2 smaller federally chartered lenders expressing concerns over the
3 burdens associated with compliance with the statute. Some of
4 these lenders have even represented their intentions to exit the
5 California credit card market due to the burdensome nature of
6 compliance. OCC argues that many of these "burdens" imposed on
7 plaintiffs by section 1748.13 are in some respects similar to
8 those the OCC found sufficient to warrant preemption in its West
9 Virginia opinion letter.

10 However, the letter also reveals that the OCC found portions
11 of the West Virginia law were insufficiently burdensome to
12 warrant preemption. During oral argument the OCC acknowledged
13 that a portion of section 1748.13, if severed, may be similarly
14 characterized and thus viewed as "*de minimus*." Thus, the OCC's
15 opinion letter offers some guidance to the court in assessing the
16 preemptive reach of the OCC's regulations in this case.

17 **B. NBA Analysis**

18 Defendants argue that the NBA analysis should begin with a
19 presumption against preemption in this case. See Defs.' Opp'n to
20 PI at 10. More specifically, defendants argue that because
21 section 1748.13 is a consumer protection law, and consumer
22 protection is an area of legislation the states have
23 traditionally occupied, the statute is entitled to a presumption
24 against preemption. Id. However, Bank of America requires a
25 contrary result. Bank of America makes clear that while states
26 are not without any authority to impose regulations upon national
27 banks, the areas in which they are permitted to regulate are
28 typically limited to "contracts, debt collection, acquisition and

1 transfer of property, and taxation, zoning, criminal, and tort
2 law." 309 F.3d at 559 (citing cases). Consumer protection is not
3 reflected in the case law as an area in which the states have
4 traditionally been permitted to regulate national banks.
5 Accordingly, under Bank of America, "because there has been a
6 'history of significant federal presence' in national banking,
7 the presumption against preemption of state law is inapplicable."
8 Id.

9 Further, national banks' authority is not normally limited
10 by, but rather ordinarily preempts contrary state law. Barnett
11 Bank, 517 U.S. at 32, 34 ("[W]here Congress has not expressly
12 conditioned the grant of 'power' upon a grant of state
13 permission, the Court has ordinarily found that no such condition
14 applies."). The express power of the NBA at issue here is that of
15 "loaning money on personal security." 12 U.S.C. § 24 (Seventh).
16 There is no indication in the NBA that Congress intended to
17 subject that power to local restriction. See Barnett Bank, 517
18 U.S. at 34-35. Therefore, the court proceeds with the
19 understanding that the ordinary rule is one of preemption of
20 contrary state law.

21 In order to survive preemption, section 1748.13 must not
22 prevent or significantly interfere with national banks' powers
23 under the NBA. See Barnett Bank, 517 U.S. at 33. National banks'
24 powers include those that are incidental, or those that are
25 "convenient or useful in connection with the performance of one
26 of the bank's established activities pursuant to its express
27 powers under the National Bank Act." M & M Leasing Corp., 563
28 F.2d at 1382. Plaintiffs maintain that section 1748.13 interferes

1 with the federal power to lend money through its imposition of
2 costly operational and administrative burdens on national banks'
3 lending activities. Pltfs.' MSJ at 15. Plaintiffs have submitted
4 evidence that compliance with section 1748.13 will impose
5 significant monetary and non-monetary costs on national banking
6 institutions. Those costs may be roughly categorized as follows:

7 (1) Paper and postage costs. See Christie Decl., filed
8 May 31, 2002, at ¶ 17; Fimby-Dukart Decl., filed May
9 31, 2002, at ¶ 10; Morrison Decl., filed May 31, 2002,
10 at ¶ 8; Stork Decl., filed May 31, 2002, at ¶ 11;
11 Staten Decl. No. 4 at ¶ 5.

12 (2) Reduced profits (through increased delinquencies)
13 due to displacement of front-page billing information.
14 See Fimby-Dukart Decl. at ¶ 6; Hill Decl. at ¶ 12;
15 Stork Decl. at ¶ 10.

16 (3) Reduced profits due to emphasis on potential
17 negative effects of borrowing.

18 (4) Provision of misinformation to consumers. See Ward
19 Decl. at ¶¶ 9-11.¹⁸

20 (5) Staffing of phone banks. See Staten Decl. No. 4 at
21 ¶ 5.

22 (6) Exit from California credit card market by smaller
23 banking institutions. See Hamby Decl. at ¶¶ 5-7; Youngs
24 Decl. at ¶¶ 7-8.

25
26 ¹⁸ Plaintiffs conducted a consumer survey in which they
27 discovered that over 50% of 843 randomly selected cardholders
28 incorrectly understood the Minimum Payment Warning to mean that
paying only the minimum would increase the interest rate on their
credit cards. See Ward Decl. at ¶ 9-11.

1 (7) Coercion to impose 10% minimum monthly payment. See
2 Dugan Decl. at ¶¶ 5, 7, Ex. A; Comstock Decl. at Ex. A.

3 (8) Software and hardware establishment and maintenance
4 costs. See Staten Decl. No. 4 at ¶ 5.

5 (9) Interference with banks' business experience
6 regarding counseling procedures. See Hill Decl. at ¶ 9;
7 Kietz Decl. No. 1 at ¶ 20; Weber Decl. No. 1 at ¶ 19.

8 There is, however, no authority that provides a yardstick
9 for measuring when a state law "significantly interferes with,"
10 "impairs the efficiency of," "encroaches on," or "hampers" the
11 exercise of national banks' powers. See Barnett Bank, 517 U.S. at
12 33-34. However, the threshold of preemption is in some cases
13 remarkably low. For example, in Franklin National Bank v. New
14 York, the Supreme Court found that a state statute prohibiting
15 national banks from using the word "saving" or "savings" in
16 advertising their business was preempted by the NBA. 347 U.S.
17 373, 377-79 (1954). The state law imposed no affirmative
18 requirements on national banks, unlike section 1748.13. Nor were
19 there any costs associated with compliance with the law, again,
20 unlike section 1748.13. Rather, national banks were simply
21 required to abstain from using two words in the advertising
22 context. Nevertheless, the Court found the state law preempted,
23 and concluded that "[h]owever wise or needful New York's policy .
24 . . it must give way to the contrary federal policy." Id. at 379.
25 Similarly, the court may not consider the State's needfulness of
26 section 1748.13 here, no matter how compelling it finds the
27 State's reasons for enactment of the statute.

28 The Supreme Court, however, has also found that other

1 burdens are insufficient to warrant preemption. For example, in
2 Lewis v. Fidelity & Deposit Co. of Maryland, the state statute at
3 issue was one that required enforcement of a lien under state
4 law. 292 U.S. 559 (1934). The bank argued that due to this law,
5 it would be unable to sell property it was entitled to because no
6 one would purchase property subject to a lien. Id. at 567. The
7 Court recognized that "a national bank is subject to state law
8 unless that law interferes with the purposes of its creation, or
9 destroys its efficiency, or is in conflict with some paramount
10 federal law." Id. at 566. Nevertheless, the Court concluded that
11 the state law was not preempted. Id. at 567-68.

12 The above cases and others¹⁹ illustrate that there is no
13 single cognizable standard by which state laws are subject to
14 preemption. As a result, understandably, the court should look to
15 the OCC's interpretation of the NBA which, if reasonable, is
16 entitled to "great weight." Here, the OCC states that terms and
17 conditions of extensions of credit as well as management of
18 credit accounts are powers "at the heart of" the NBA authority to
19 lend money. In assessing the various options for compliance with
20 section 1748.13, the OCC found that the burdens imposed under
21 each option, both monetary and non-monetary, are "substantial."
22 In light of the evidence and controlling precedential authority,
23 the OCC's opinion is a reasonable one, and thus the monetary and
24 non-monetary costs identified by plaintiffs constitute a

25
26 ¹⁹ The Supreme Court's opinion in Barnett Bank contains a
27 thorough survey of cases finding preemption of state laws by the
28 NBA, as well as those cases finding no preemption of state law by
the NBA. See Barnett Bank, 517 U.S. at 32-34.

1 significant interference with national banks' powers under the
2 NBA.

3 **5. Federal Credit Union Act**

4 The FCUA was enacted to regulate federal credit union
5 activities. The National Credit Union Association ("NCUA") is
6 granted exclusive authority under the FCUA to "regulate the
7 rates, terms of repayment and other conditions of Federal credit
8 union loans and lines of credit (including credit cards) to
9 members." 12 C.F.R. § 701.21(b). The NCUA's regulatory authority
10 "preempts any state law purporting to limit or affect" rates of
11 interest and terms of repayment, including the amount,
12 uniformity, and frequency of payments. Id.

13 However, 12 C.F.R. section 701.21(b)(3) also expressly
14 limits the preemptive effect of NCUA regulations:

15 Except as provided by paragraph (b)(1) of this section,
16 it is not the Board's intent to preempt state laws
17 affecting aspects of credit transactions that are
18 primarily regulated by Federal law other than the
Federal Credit Union Act, for example, *state laws
concerning credit cost disclosure requirements*

19 12 C.F.R. § 701.21(b)(3) (emphasis added).²⁰

20 The NCUA has issued an opinion letter concluding that
21 section 1748.13 is preempted by its lending regulation. See App.
22 of Miscellaneous Authorities in Supp. of Pltfs.' Mot. for Summ.
23 J. and Perm. Inj. Relief and Pltfs.' Appl. For Prelim. Inj.
24 ("Pltfs.' App."), filed Sept. 20, 2002, at Ex. E. In that opinion

25 ²⁰ The NCUA has further directed that in cases where other
26 federal laws, such as the federal Truth in Lending Act ("TILA"),
27 establish their own standards for determining preemption of state
28 laws, federal credit unions "should generally look to those
standards in determining preemption issues." 49 Fed. Reg. 30,683,
30,684 (NCUA Aug. 1, 1984).

1 letter, the NCUA states:

2 The California law at issue *affects the terms of*
3 *repayment by placing additional burdens* on credit card
4 issuers that do not require minimum monthly payments of
5 at least ten percent. NCUA's longstanding position is
6 that state laws affecting terms of repayment are
7 preempted. 49 Fed. Reg. 30683, 30684 (August 1, 1984).

8 Pltfs.' App. at Ex. E (emphasis added).

9 The NCUA asserts that the 10% repayment option "affects the
10 terms of repayment," since federal credit unions must either
11 impose a 10% minimum monthly repayment or be subjected to the
12 onerous requirements of the statute.²¹ The NCUA regulations
13 establish that the agency does not intend to preempt state laws
14 concerning credit cost disclosure requirements. 12 C.F.R. §
15 701.21(b)(3). However, section 1748.13 does not simply impose
16 credit cost disclosure requirements, but rather uses credit
17 disclosures and other requirements (e.g. phone banks) as
18 sanctions to coerce lenders into imposing a 10% minimum payment.
19 Thus "disclosures" under section 1748.13 would seem to fall
20 outside the purview of 12 C.F.R. section 701.21(b)(3).
21 Accordingly, the requirements imposed by section 1748.13 appear
22 to conflict with the NCUA's broad power to regulate the rates,
23 terms of repayment, and other conditions of federal credit union
24 loans and lines of credit.

25 **6. Severability**

26 The issue of severability presents the remaining question,
27 namely, is there a portion of the statute which properly escapes
28

26 ²¹ Presumably, the NCUA's opinion would also be applicable
27 to section 1748.13(c)(2), which permits credit card issuers to
28 escape the requirements of the statute in billing cycles where
29 they do not impose finance charges. Cal. Civ. Code §
30 1748.13(c)(2).

1 the preemptive reach of the NBA or the FCUA that can be enforced
2 by the State of California?

3 **A. NBA**

4 When assessing the NBA's preemptive effect on section
5 1748.13 in its *amicus* brief, the OCC did not look at each
6 provision of the statute individually. Rather, it based its
7 analysis upon what it saw to be the four "options" available to
8 national banks under the statute. During oral argument, when
9 questioned about a possible severable provision of the statute
10 such as the generic Minimum Payment Warning, the OCC responded
11 that the agency "could not commit itself to an answer" on the
12 question. Reporter's Transcript of Proceedings ("RT"), Dec. 6,
13 2002, at 47-49. However, the OCC represented that it considers
14 such a disclosure "salutary," one that imparts information people
15 "should know." RT at 48. The OCC additionally noted that there
16 have been instances where the agency found that a state law that
17 imposed a burden on national banks was not preempted when the
18 burden is *de minimus*, such as discussed in the West Virginia
19 opinion letter above. RT at 49-50; see Preemption Opinion, 66
20 Fed. Reg. at 51,507.

21 Because the OCC has not issued an opinion letter
22 specifically discussing section 1748.13, and because the OCC's
23 *amicus* brief does not address the preemptive effect of each
24 individual provision of section 1748.13, the court is without a
25 "formal" agency position on the matter. However, taking the West
26 Virginia opinion letter and the OCC's comments during oral
27 argument as a guide, there appears a distinct likelihood the OCC
28 would find that a generic Minimum Payment Warning, if severable,

1 is insufficiently burdensome to warrant preemption.

2 The Minimum Payment Warning alone would take up only one or
3 two lines of text on the first page of credit cardholders'
4 billing statements. Absent the other disclosure requirements
5 mandated by section 1748.13, this simple warning is unlikely to
6 result in the addition of a page to monthly billing statements.
7 Thus, additional paper, printing, and postage costs will be
8 minimal if not non-existent.²² Other monetary costs include
9 establishing a system to identify the bills of only California
10 cardholders. Because credit card issuers already have systems in
11 place to distinguish between different cardholders, this cost
12 should also be minimal. Finally, there is insufficient evidence
13 that other important billing information would be displaced, thus
14 resulting in increased delinquencies. In short, if credit card
15 issuers were required to include only the Minimum Payment Warning
16 on billing statements, the burdens imposed would be
17 insignificant.

18 **B. FCUA**

19 A similar analysis regarding the Minimum Payment Warning is
20 applicable to the FCUA. While the NCUA correctly notes in its
21 opinion letter that section 1748.13's statutory scheme imposes
22 significant "additional burdens," the "burden" imposed by the
23

24 ²² The illustrative examples required under section
25 1748.13(a)(2), while perhaps informative to cardholders,
26 nevertheless impose substantial costs on card issuers. Because
27 these statements would take up numerous lines of space on billing
28 statements, plaintiffs' concerns regarding additional paper,
printing, and postage costs if these requirements were to be
imposed are convincing. Therefore, the court is persuaded that
these disclosure requirements impose significant burdens on
federally chartered credit card issuers.

1 Minimum Payment Warning is unrelated to the "burdens" of
2 repayment, since it is a "credit cost disclosure" expressly not
3 preempted by the NCUA's own regulations. See 12 C.F.R. §
4 701.21(b)(3). In the absence of the other requirements of section
5 1748.13, the Minimum Payment Warning would simply be a "credit
6 cost disclosure requirement," which the NCUA has declared it has
7 no intention to preempt. In addition, a severable Minimum Payment
8 Warning may well be *de minimus* and "salutary," as noted by the
9 OCC.

10 **C. Enforcement of Section 1748.13**

11 The court has found that HOLA and OTS holistically preempt
12 section 1748.13 in its entirety. The court further finds that the
13 NBA and OCC, and the FCUA and NCUA, preempt the statute with the
14 possible exception of the Minimum Payment Warning. Thus the
15 question presented is whether the Minimum Payment Warning may be
16 severed so that it is enforceable against national banks and
17 federal credit unions but unenforceable against federally
18 chartered savings and loans.

19 The court must apply California law when addressing
20 severability of a statute. See Leavitt v. Jane L., 518 U.S. 137,
21 139 (1996). The severability determination requires an assessment
22 of whether the invalid parts of the statute can be severed from
23 the otherwise valid parts without destroying the validity or
24 utility of the remaining provisions. See Raven v. Deukmejian, 52
25 Cal. 3d 336, 355-56 (1990). More specifically, the invalid
26 provisions must be severable (1) grammatically; (2) functionally;
27 and (3) volitionally. Gerken v. Fair Political Practices Com., 6
28 Cal. 4th 707, 714 (1993).

1 A provision is grammatically severable where the "valid and
2 invalid parts can be separated by paragraph, sentence, clause,
3 phrase or even single words." Santa Barbara Sch. Dist. v.
4 Superior Court, 13 Cal. 3d 315, 330 (1975). A provision is
5 functionally severable "if the remaining provisions can stand on
6 their own, are capable of separate enforcement, can be given
7 effect, or can operate . . . independently of the invalid
8 provisions." League of United Latin American Citizens v. Wilson,
9 908 F. Supp. 755, 766 (C.D. Cal. 1995) (internal citations and
10 quotation marks omitted). Finally, a provision is volitionally
11 severable where the remainder of the statute "would have been
12 adopted by the legislative body had the latter foreseen the
13 partial invalidity of the statute." Katz v. Children's Hospital
14 of Orange County, 28 F.3d 1520, 1531 (9th Cir. 1994).

15 In this instance, section 1748.13 can be grammatically
16 severed to leave standing only subsection (a)(1), the Minimum
17 Payment Warning. The remainder of the statute can be stricken
18 without confusion or uncertainty. The court further finds the
19 statute is functionally severable. Specifically, the Minimum
20 Payment Warning stands on its own and can be separately enforced
21 against federally chartered banks and credit unions, independent
22 of the statute's invalid portions. However, despite the
23 grammatical and functional severability of the Minimum Payment
24 Warning, the court must also find volitional severability.

25 Volitional severability is the most important of the three
26 and requires a determination of legislative intent. Here, the
27 legislative record, unfortunately, does not provide a well-lit
28 path to follow. First, the court notes that the statute contains

1 no severability clause, and thus the legislature's intent to save
2 the statute in part if certain provisions were held invalid is
3 not apparent. See In re Reyes, 910 F.2d 611, 613 (9th Cir. 1990)
4 (noting that absence of severability clause suggests an "intent
5 to have all components 'operate together or not at all'"). This
6 is particularly troublesome in light of extensive authority
7 warning states that federally chartered lenders enjoy broad
8 congressional grants of authority. See Bank of America, 309 F.3d
9 at 558-59.

10 Second, the record includes no public discussion of federal
11 preemption issues. Thus, if only a portion of the statute is
12 applicable to only certain federally chartered credit card
13 issuers, section 1748.13 could not be severed "without rendering
14 the end product a Swiss cheese regulation that would not be
15 capable of 'accomplishing [the statute's] legislative purposes'"
16 as to a substantial number of federally chartered lenders. City
17 of Auburn v. Qwest Corp., 260 F.3d 1160, 1181 (9th Cir. 2001).

18 Finally, a finding of severability only as to federally
19 chartered banks and credit unions is judicially inappropriate.
20 Section 1748.13 refers generally to "credit card issuer[s]" and
21 makes no distinction between different types or categories of
22 issuers. However, if the statute is partially preempted only as
23 to certain federally chartered lenders, the court would have to
24 effectively "rewrite" the statute. This the court cannot do. See
25 Metromedia, Inc. v. City of San Diego, 32 Cal. 3d 180, 187 (1982)
26 (quoting Blair v. Pitchess, 5 Cal. 3d 258 (1971)) ("This court
27 cannot . . . in the exercise of its power to interpret, rewrite
28 the statute. If this court were to insert in the statute all or

1 any of the . . . qualifying provisions [required to render it
2 constitutional], it would in no sense be interpreting the statute
3 as written, but would be rewriting the statute in accord with the
4 presumed legislative intent. That is a legislative and not a
5 judicial function.""). For example, if the court were to sever the
6 balance of the statute to apply the basic warning only to certain
7 lenders, such severability may impose a competitive advantage of
8 one federally chartered lender over another. The result of such
9 mechanical severability would be an intrusion upon the
10 legislative and executive branches of government, both federal
11 and state.

12 Thus, the court finds that the statute may not be severed to
13 require application of subsection (a)(1) to only national banks
14 and federal credit unions. Accordingly, the court finds the
15 statute is constitutionally inapplicable in its entirety to all
16 federally chartered credit card issuers.

17 **7. Scope of Injunctive Relief**

18 Defendants maintain that the permanent injunction the court
19 issues should only benefit the named plaintiffs in this action.
20 However, because the court finds that the statute is inapplicable
21 to all federally chartered credit card issuers, this holding by
22 its very nature affects the rights of parties beyond the named
23 plaintiffs in this action. This result is consistent with other
24 cases addressing federal preemption of state or local laws, such
25 as Bank of America, where the court issued an injunction
26 preventing enforcement of the ordinance at issue without
27 reference to the parties to whom the injunction applied. 309 F.3d
28 at 556. In addition, the Ninth Circuit has recognized that "an

1 injunction is not necessarily made over-broad by extending
2 benefit or protection to persons other than prevailing parties in
3 the lawsuit." Bregsal v. Brock, 843 F.2d 1163, 1170 (9th Cir.
4 1987). Finally, the practical result of an injunction limited to
5 plaintiffs would be to require federal lenders not a party to
6 this action to bring individual actions for injunctive relief.
7 This would not only result in a waste of judicial resources, but
8 is unnecessary in light of the cases permitting general
9 injunctions in the preemption context.

10 **CONCLUSION**

11 For the foregoing reasons, the court holds that the HOLA and
12 OTS regulations preempt section 1748.13 in its entirety. The
13 court further holds that the NBA and OCC regulations and the FCUA
14 and NCUA regulations preempt all sections of 1748.13 except
15 subsection (a)(1). Since the court finds that subsection (a)(1)
16 may not be severed to require application of subsection (a)(1) to
17 only national banks and federal credit unions, it holds that
18 section 1748.13 in its entirety is inapplicable to all federally
19 chartered banks and credit unions.

20 ///

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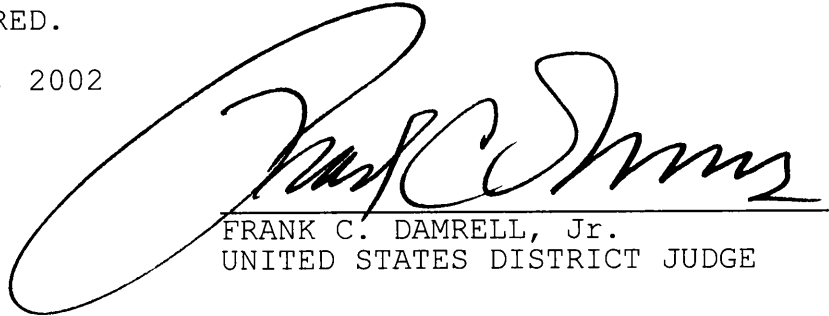
27 ///

28 ///

1 Accordingly, plaintiffs' motion for summary judgment and for
2 a permanent injunction is GRANTED.²³ A permanent injunction shall
3 issue prohibiting defendants from enforcing the statute against
4 all federally chartered credit card issuers.

5 IT IS SO ORDERED.

6 DATED: December 23, 2002

7 
8
9 FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE

27 ²³ Because the court grants plaintiffs' motion for summary
28 judgment and for a permanent injunction, plaintiffs' motion for a
preliminary injunction is DENIED as moot.

United States District Court
for the
Eastern District of California
December 23, 2002

* * CERTIFICATE OF SERVICE * *

2:02-cv-01138

American Bankers

v.

Lockyer

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on December 23, 2002, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office, or, pursuant to prior authorization by counsel, via facsimile.

John Joseph Quinn Jr
Arnold and Porter
777 South Figueroa Street
44th Floor
Los Angeles, CA 90017-2513

MP/FCD

CF/JFM

Dennis G Lyons
PRO HAC VICE
Arnold and Porter
555 Twelfth Street Northwest
Washington, DC 20004

Michele J Woods
PRO HAC VICE
Arnold and Porter
555 Twelfth Street Northwest
Washington, DC 20004

Christine E Koh
PRO HAC VICE
Arnold and Porter
555 Twelfth Street Northwest
Washington, DC 20004

Howard N Cayne
PRO HAC VICE

Susan Eileen Henrichsen
Attorney General of the State of California
PO Box 85266
110 West A Street
Suite 1100
San Diego, CA 92186-5266

Robyn Cerny Smith
Attorney General's Office of the State of California
Department of Justice
300 South Spring Street
Fifth Floor
Los Angeles, CA 90013-1204

Douglas B Jordan
NOT EDCA ADMITTED
Office of the Comptroller of the Currency
250 E Street SW
Washington, DC 20219

Jeffrey Allen Rich
Attorney General's Office for the State of California
PO Box 944255
1300 I Street
Suite 125
Sacramento, CA 94244-2550

Deanne Beth Loonin
National Consumer Law Center
77 Summer Street
Tenth Floor
Boston, MA 02110

Jack L. Wagner, Clerk

BY:


Deputy Clerk